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HAROLD B. WILLEY,

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 519

COMMONWEALTH OF PENNSYLVANIA,
Respondent

v.

ALFRED J. ACKERMAN, Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND APPENDIX

MARJORIE HANSON MATSON
HARRY S. KALSON
Law & Finance Building
Pittsburgh, Pennsylvania
MURDAUGH STUART MADDEN
1000 Hill Building
Washington, D. C.
Attorneys for Petitioner

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

ALFRED J. ACKERMAN, the petitioner herein, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of the Commonwealth of Pennsylvania, made and entered October 13, 1954, refusing to review the decision of the Superior Court of Pennsylvania, sustaining his conviction, state remedies now having been exhausted.

OPINIONS BELOW

The opinion of the Court of Quarter Sessions of Allegheny County, Pennsylvania, was not reported. The Superior Court's opinion is reported in 176 Pa. Superior 80, and in 106 A 2d 886. No opinion was filed by the Supreme Court of Pennsylvania, but an order was entered dismissing the Petition for Leave to Appeal. Copies of the opinions and of the order of the Supreme Court are annexed to this Petition as Appendix I.

JURISDICTION

(i) The order sought to be reviewed was dated and entered October 13, 1954.

(ii) A Petition for Leave to Appeal from the Judgment of the Superior Court of Pennsylvania was filed in the Supreme Court of Pennsylvania on July 21, 1954, and was denied by the court on October 13, 1954. No order has been sought or granted to extend the time within which to petition for certiorari.

(iii) The statutory provisions believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari are 28 U. S. C., sections 1257 and 2254.

QUESTIONS PRESENTED FOR REVIEW

(I) WHETHER THE CONSOLIDATED TRIAL OF TWO DEFENDANTS ON 106 SEPARATE INDICTMENTS DEPRIVED PETITIONER OF DUE PROCESS OF LAW AS GUARANTEED BY ARTICLE XIV OF THE UNITED STATES CONSTITUTION.

(II) WHETHER UNDER ALL THE CIRCUMSTANCES OF THIS CASE PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE MANNER AND MEANS OF HIS CONVICTION.

CONSTITUTIONAL PROVISION INVOLVED

U. S. Constitution, Article XIV, Section 1: "* * * nor shall any state deprive any person of * * * liberty * * * without due process of law."

STATEMENT OF THE CASE

Petitioner, Alfred J. Ackerman, a Justice of the Peace, was indicted in the Court of Quarter Sessions of Allegheny County, Pennsylvania, on numerous charges of Extortion, False Pretense, Misdemeanor in Office, Violation of the Motor Code, and, with a co-defendant, a Deputy Constable, for Conspiracy to Cheat and Defraud. All of the cases arose out of the petitioner's conduct of the office of Justice of the Peace, which office he had held for approximately 20 years. An investigation made by the District Attorney's office for the period of January 1951 to August 1952, resulted in criminal prosecutions based upon the handling of 37 different cases, out of the approximately 6600 disposed of by the Squire during that period.

Immediately following the return of indictments by the Grand Jury early in May, some 80 cases against defendant Ackerman, and 26 against Deputy Constable Bolden, were listed for trial on May 20, 1953. Pre-trial motions to quash, and for a continuance based upon the extensive and prejudicial publicity which the case had received in the newspapers and through other media of communication, were argued and refused prior to trial (R. pp. 2a, 5a, 7a, 9a, 11a, 13a, 15a, 17a, 19a).

A motion for separate trials on the several indictments, in accordance with Pennsylvania practice, was made on the date set for trial and was rejected (R. pp. 71a, 73a). Evidence was then submitted to the jury in each of the 80 indictments against petitioner and the 26 cases against Bolden. On May 29, 1953, the jury found Bolden guilty on all charges, and Ackerman guilty on 57 cases. In nine cases of False Pretense and the companion cases of Misdemeanor in Office, Ackerman was found not guilty (R. p. 1399a). In four cases, demurrers were sustained, and in one case the jury failed to return a verdict. The Commonwealth agreed to *nolle pros.* this case rather than send the jury out for further deliberation (R. p. 1400a, 1401a).

Of the 106 separate indictments against defendants Ackerman and Bolden, 53 charged the commission of felonies, 73 of misdemeanors. At every stage of the proceedings—by motion for separate trial, motions in arrest of judgment and for a new trial, and on appeal—the defendant raised the constitutional question of whether such consolidated trial deprived him of due process of law.

The charges for the most part arose out of the collection of the costs in criminal cases over an 18 month period. The Commonwealth contended that the defendants had collected costs from the County in cases where they had collected previously from the parties, had charged fees that they were not entitled to, had collected larger fees than the law allowed, etc. In one case, Squire Ackerman was charged with Violation of the Motor Code in that he had failed to keep a record of a certain case, and in another Motor Vehicle case, had failed to turn over to the Commonwealth of Pennsylvania two fines of $10.00 each. The total costs allegedly collected illegally amounted to a few hundred dollars.

Post-trial motions having been refused, Ackerman was sentenced on nine cases, and sentence was suspended on the remaining 48 cases (R. p. 1423a). The total period of imprisonment imposed was two years. Appeals were taken to the Superior Court of Pennsylvania on the nine cases where appeal was permitted under Pennsylvania law. Petitioner was released on bond pending final disposition of the cases.

On July 13, 1954, the Superior Court sustained the convictions in eight of the cases, and reversed in one case on non-federal grounds. Application for review was made to the Supreme Court of Pennsylvania and the said court refused *allocatur* on October 13, 1954. Remittitur was stayed pending the application to this court.

HOW AND WHEN FEDERAL QUESTIONS RAISED AND THEIR DISPOSITION BELOW

Questions arising under Article XIV of the United States Constitution were raised prior to trial by the Motions for a Continuance and for separate trial on the several indictments. After verdict, the question of consolidated trial was raised by Motions for a New Trial and in Arrest of Judgment. The court en banc, in disposing of said motions, held the consolidation to have been a proper exercise of judicial discretion, without discussing specifically the "due process" question.

On appeal, the due process question involved in consolidation was raised and passed on by the Superior Court. The court held that the indictments involved similar or connected offenses and that it was within the trial court's discretion to determine whether they could properly be tried together. Finding no abuse of discretion on the part of the trial court, and no prejudice to defendant by reason of the consolidated trial, the Superior Court refused to reverse on this ground.

Due process questions were also raised in connection with the effect of pervasive pre-trial publicity, sequestration of the jury, pressure by the trial judge to speed up proceedings, etc. As to these points, the Superior Court held that "there was no denial of due process on other grounds in these cases." (Appendix p. 46).

Again, in the Petition for Leave to Appeal to the Supreme Court, appellant raised the constitutional issues here involved, but the petition was denied without opinion.

ARGUMENT

I. The Consolidated Trial of Two Defendants on 106 Separate Indictments Deprived Petitioner of Due Process of Law as Guaranteed by Article XIV of the United States Constitution. This Question Has Not Previously Been Decided by This Court.

A. The Facts. Petitioner and another defendant, who was separately indicted on all charges except the conspiracy, were tried before the same jury on 106 separate indictments, 53 of which charged the commission of felonies, and 73 of misdemeanors. Of the 80 indictments against this defendant, 30 charged felonies.

In the trial of the case, 108 witnesses were called, a number of these being recalled several times. The total record covers 1424 printed pages, 70 of which comprise the oral charge of the trial court. The 106 indictments arise out of 37 fact situations, each of which is separate and distinct, involving different witnesses and offenses committed on different dates over an 18 month period. The jury was, however, charged with the duty of deciding each case on its own merits.

The nine cases (18 indictments) on which petitioner was found NOT GUILTY arose out of the collection of costs in Motor Vehicle Code violation cases. All of the cases had been returned to the County Controller for the collection of costs on the same day, obviously as a result of an error in the Squire's office. This was the only group of cases readily distinguishable from the fact situations in other indictments.

Trial of the case extended over a nine day period, during which time the jury was sequestered. Late ses-

sions of the court were held practically every day, sessions were held on Saturday, contrary to usual practice in Pennsylvania, and every effort was made to speed up the trial in order to avoid interference with the approaching Memorial Day holiday. Verdicts were reached on May 29, 1953, in all except one of the cases which had been submitted. The failure to return a verdict in this case was obviously an oversight, since the jury had found petitioner guilty in the other cases arising out of the same fact situation. Consequently, the District Attorney agreed to *nolle pros.* this case (R. pp. 1400a, 1401a).

B. The Law. In affirming petitioner's convictions, the Superior Court of Pennsylvania referred to the holding of this court in *Lisenba v. California,* 314 U. S. 219 (1941), wherein Mr. Justice Roberts referred to due process as follows:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." (at p. 236)

Measuring the facts of this case against the standard of "fundamental fairness," the Superior Court found no denial of due process. This holding, while necessarily involving an interpretation of the facts by the state court, is not conclusive upon this court: *Powell v. Alabama,* 287 U. S. 45 (1932).

An examination of the Superior Court's opinion clearly establishes that there is no adequate non-federal ground upon which the decision may be sustained. The

constitutional question goes to the very heart of the case and was expressly passed upon the Superior Court.

While no particular form of procedure in state criminal cases is guaranteed by the United States Constitution, the procedures afforded must protect the substantial rights of the accused: *Twining v. New Jersey,* 211 U.S. 78 (1908); *Tumey v. Ohio,* 273 U. S. 510 (1927); *Dohany v. Rogers,* 281 U. S. 362 (1930). The charges must be fairly made and fairly tried: *In re Oliver,* 333 U. S. 257 (1948). The essence of due process is fair play: *Galvan v. Press,* 347 U. S. 522 (1953).

Essential to due process in American courts is the doctrine of presumption of innocence. To destroy this presumption inevitably defeats the substantial rights of the accused. Constitutional guarantees prohibit this result.

Passing upon the question of the extent to which the presumption of innocence may be defeated by statute, this court, in *Manley v. State of Georgia,* 279 U. S. 1 (1929), invalidated a statute which created an arbitrary presumption of fraud in the case of insolvency of a bank. Again, in *Monsette v. U. S.,* 342 U. S. 246 (1951), this court reversed a conviction where the trial judge had instructed the jury that criminal intent must be presumed from the mere doing of the act in question. Mr. Justice Jackson spoke as follows:

> "* * * this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary.

> Even congressional power to facilitate convictions by substituting presumptions for proof is not without limits. Tot v. U.S., 319 U. S. 463." (at page 275)

The presumption of innocence was just as surely destroyed in this case by the consolidated trial as it was in the *Manley* and *Monsette* cases. That such must be the effect where a multiplicity of formal charges against the same defendant is submitted to the same jury has long been recognized. In *McElroy v. U. S.*, 164 U. S. 76 (1896), in reversing a conviction in a case where five defendants were tried together on four indictments, Chief Justice Fuller spoke as follows:

> "The several charges in the four indictments were not against the same persons, nor were they for the same act of transaction, nor for two or more acts or transactions connected together; and in our opinion they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence. *In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense or restrict the evidence to one transaction."* (Emphasis supplied)

In the instant case there were 37 fact situations, out of each of which a number of different indictments grew. Each group of cases constituted separate and distinct substantive offenses, complete in themselves, committed at different times and not provable by the same evidence. Nor were the offenses of the same class, since some were felonies and others misdemeanors. The alleged "connection" between them, relied upon by the trial court to sustain the consolidation, was that, taken together, the offenses indicated on the part of the defendant "a frame of mind which was wilful and corrupt." (R. p. 1409a).

If consolidation may be sustained on the basis of such general criminal intent, then the rule of the *McElroy* case becomes a nullity. Intent being a necessary element of most crimes, consolidated trial of as many separate offenses as the prosecuting attorney feels are necessary to procure a conviction may be resorted to.

That a multiplicity of formal charges against the same defendant creates a presumption of guilt, has been widely recognized. Blackburn, J., commented as follows in *Castro v. Queen,* 6 App. Cas. 229 (1881):

> "Frequently the mere fact of accusing him of several things was supposed to tend to insure the probability of his being found guilty, as it amounted to giving evidence of bad character against him."

The language of Chief Justice Agnew, of the Pennsylvania Supreme Court is to the same effect. Speaking in *Shaffner v. Commonwealth,* 72 Pa. 60, 65 (1872), he said:

> "It is not proper to raise a presumption of guilt, on the ground that, having committed one crime,

> the depravity it exhibits makes it likely he would commit another."

While this comment was directed to a case in which, on trial of one offense, the Commonwealth offered evidence of another crime, it is also applicable to the submission of a series of indictments to the same jury.

In our case, the Commonwealth immediately raised that "presumption of guilt" to which Chief Justice Agnew referred when it charged our defendant before the same jury with the commission of 30 felonies, plus 50 misdemeanors.

Not only does the submission of multiple charges in itself prejudice the jury and predispose them to a finding of guilt, but also it must inevitably confuse the jury. Theoretically, the jury in this case was supposed to determine each indictment on its own merits, without regard to the defendants' guilt or innocence on other cases. The impossibility of the jury's making such a determination is apparent from a mere statement of the facts of the case, *i.e.,* that 106 indictments were before them. That no such independent decision was actually made becomes obvious by a reference to the record.

In one case in which this petitioner was charged with Misdemeanor in Office, the jury failed to return any verdict whatsoever, this case having apparently been overlooked in its deliberations. The Commonwealth agreed to a *nolle pros.* in order to dispose of this case (R. pp. 1400a, 1401a). In another case, the court sustained a demurrer to one of the Extortion charges against petitioner's co-defendant, Bolden, yet, on the companion case of Misdemeanor in Office, Bolden was found guilty. A

careful reading of the portion of the charge relating to this case, and the interpolations of counsel in connection therewith, give absolutely no clue as to which charges against Bolden arising out of this fact situation were actually submitted to the jury (R. p. 1357a).

In connection with the listing of charges in one fact situation, the court failed to refer to the charge of Extortion and did not specifically point out the facts sustaining the charge of False Pretense as distinguished from those giving rise to the Extortion charge. Nonetheless, Bolden was found guilty of both offenses.

In the oral charge of the court, reference was made to the fact that there were "perhaps about 36 different fact situations" (R. p. 1330a). In the opinion on the post-trial motions, the court speaks of "only 37 factual situations" (R. p. 1409a). If the court itself could not keep even the number of cases straight, it is apparent that the jury must have been equally confused by the multiplicity of issues.

Nor was the confusion of issues confined to the trial court. On appeal, with only nine cases to deal with directly, the Superior Court succeeded in missing the entire point of defendant's objection to the conviction involved in the appeal at No. 70 April, 1954. Awarding a new trial on this one case, the Superior Court stated that on retrial the Commonwealth must proceed on the *statutory* charge alone of Violation of the Motor Code, rather than for the common law offense of Misdemeanor in Office, completely ignoring the fact that defendant had already been tried for the statutory offense, found guilty and sentence suspended. Hence, a new trial for the same offense would

obviously be barred under the doctrine of autrefois convict.

The confusion created by the numerous indictments also resulted in the submission to the jury of many indictments in which no case was actually made out by the Commonwealth. In the case on appeal at No. 74 April, 1954, the Superior Court sustained a conviction for False Pretense upon proof that the money allegedly obtained illegally had been collected, not from the County of Allegheny, on February 6, 1952, as charged in the indictment, but from one Parks, probably some time in July, 1952. This variance of *allegata* and *probata* would normally have entitled the defendant to a reversal. We refer to the case here not because we believe this court has a duty to correct mistakes of law in the state court (*Buchalter v. New York,* 319 U. S. 427), but because it indicates the confusion present at every stage of this case, and the prejudice resulting to defendant therefrom.

In determining the meaning of due process, this court has always given consideration to settled usages and modes of procedure under the common law: *Powell v. Alabama,* cited *supra.* There is no doubt but that at common law the trial of more than one felony indictment before the same jury was unknown. Such was also the rule in Pennsylvania, as Justice Gibson pointed out in the case of *Withers v. Commonwealth,* 5 S. & R. 59, where he sustained the consolidation of misdemeanor cases, but said:

> "As to felonies, a different rule prevails, and the court goes so far as to quash where distinct offenses are charged, or, if no motion for that pur-

pose be made in time, to compel the prosecutor to select a particular offense, to which alone the prisoner is held to answer."

This general rule has not been modified by statute in Pennsylvania. The legislature has permitted a few isolated departures from it, which exceptions serve only to emphasize the rule. Thus, since 1860, it has been possible to charge wilful and involuntary manslaughter in the same indictment, or to combine counts of Larceny and Receiving Stolen Goods, to charge distinct acts of embezzlement, not exceeding three, committed by a servant against the same master, provided the acts occurred during a six month period. All of these specific provisions indicate the legislative intent to prevent a defendant from being prejudiced by a multiplicity of issues or confounded in his defense.

The practice followed in this case, then, is contrary to the common law and is not sanctioned by statute. Rather, it represents a judicial improvisation, of the type referred to by Mr. Justice Jackson in the *Monsette* case, directed to the end of expediting the disposition of criminal cases. This end the consolidation certainly served—although just why the burden of disposing of 80 charges, involving offenses for which this 62 year old defendant might have received a sentence of over 200 years, should have been imposed upon the court in the first place, is hard to conceive. When a rule of state procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental," it is time for this court to intervene: *Snyder v. Massachusetts,* 291 U. S. 97, 105 (1934). The presumption of innocence is such a fundamental principle.

Argument.

Consolidation of felony charges is a recent development in Pennsylvania. The practice was accepted first, apparently without serious question being raised, in misdemeanor cases. Here it was clearly proper without statutory sanction, because the practice had obtained at common law. Commencing with the 1940s, however, the Superior Court in a series of cases, permitted consolidation of felony charges on a broad basis, and it is these cases which are relied upon to sustain consolidation herein. A careful examination of briefs and records in all of these recent cases involving felonies indicates that the constitutional question was never raised or considered by the Superior Court. Nor were any of these cases reviewed by the Supreme Court of Pennsylvania. Yet here the Superior Court dismisses the constitutional question with a casual reference to the rule that consolidation of similar or connected offenses is a matter within the discretion of the trial court. (Appendix page 45).

Decisions in federal cases, while of course not controlling as to what constitutes due process under the Fourteenth Amendment, may afford some measure by which a denial of due process may be judged: *Bute v. Illinois,* 333 U. S. 640 (1947). It should be noted that Federal Rules of Criminal Procedure permit consolidation in proper circumstances. Thus, there is more justification for consolidation in the federal courts than in Pennsylvania, where no statute or court rule expressly authorizes it. We find, however, no case in the federal courts in which as many as 50 felonies were tried before the same jury, nor any in which two defendants faced a total of 106 indictments at the same time.

The standards for proper consolidation in the federal courts seem to be those laid down early by this court, in *McElroy v. U. S.*, cited *supra*, and *Pointer v. U. S.*, 151 U. S. 396 (1894). It is universally recognized that charges tried jointly should be of the same class or grade, and that consolidation should never be allowed where the jury might be confused or the defendant prejudiced: *Kidwell v. U. S.*, 38 App. D. C. 566 (1912); *U. S. v. Perlstein*, 120 F 2d 276 (C. A. 3 1941); *Dunaway v. U. S.*, 205 F 2d 23 (C. A. D. C. 1953).

Summarizing holdings in the federal courts, Judge Fahy spoke as follows in the *Dunaway* case:

> "Whether the criteria are stated in terms of deprivation of a substantial right, or of embarrassing or confounding the making of a proper defense, or more generally in terms of whether a defendant can be fairly tried on one or more charges at once, the principles thus expressed place boundaries, though imprecise, to the discretion of the trial judge." (at p. 25)

In our case, the trial judge went far beyond the proper boundaries, and created a situation so confused and complicated that defense became impossible.

In 1925, the case of *U. S. v. Ashe*, 270 U. S. 424, came before this court. This was a *habeas corpus* action, brought by one Valotta following affirmance by the Pennsylvania Supreme Court of his convictions for murder. Judge Thomson of the federal district court for Western Pennsylvania had issued the writ, basing his decision upon the denial to the defendant of due process arising from the joint trial of two murder indictments: *Common-*

wealth ex rel. Valotta v. Ashe, 2 F 2d 735 (1924). Reviewing Pennsylvania law, Judge Thomson emphatically rejected the contention that either the common law or Pennsylvania statutory law permitted consolidated trials in felony cases. This court reversed the decision, holding that the question of what was due process under Pennsylvania law was for the state courts.

The 1925 decision in the *Valotta* case undoubtedly reflected the then reluctance of this court to exercise supervisory control over the actions of state courts, even where constitutional questions were involved. Since that time, this court has repeatedly stepped in to protect constitutional liberties, in cases too numerous to cite. To the extent that the *Valotta* case holds that consolidated trial of felony charges is a matter exclusively within the control of the state, we submit that it no longer represents the attitude of his court toward due process questions, and accordingly, the decision should be considered solely as a ruling on the facts of the case, rather than as establishing a general principle of law. On its facts, the *Valotta* decision was proper under the previous holding in *Pointer v. U. S.,* cited *supra,* where this court sustained the joint trial of two murder indictments, where the homicides were committed at the same time and place and with the same weapon.

This case presents a situation in which normal procedural rules designed to protect an accused were completely ignored on the basis of expediency. Such a course of procedure is constitutionally invalid. As Mr. Justice Frankfurter pointed out in *McNabb v. U. S.,* 310 U. S. 332, 347 (1943):

> "The history of liberty has largely been the history of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

This defendant had a right to a fair trial regardless of how guilty the prosecuting attorney believed him to be. He was entitled to a genuine hearing on the merits of his case: *Palko v. Connecticut,* 302 U. S. 319, 327 (1937). This he failed to receive, and, as a consequence, his denial of guilt and the character testimony of eminent citizens who appeared in his behalf, fell on deaf ears. This court is now the only forum in which relief may be sought.

The interests not only of this petitioner, but of countless other defendants who will be tried in the courts of Pennsylvania require that this case be reviewed. If the decision of the Superior Court allowing consolidated trial of 106 separate indictments is permitted to stand, an overzealous district attorney may assure a conviction in any case, no matter how innocent the defendant may be, simply by the device of multiplying charges against him. As this court is well aware, the sanctioning of short cuts in criminal procedure more often harms the innocent than the guilty.

II. Under All of the Circumstances of This Case Defendant Was Denied Due Process of Law by the Manner and Means of His Conviction.

A. *The Facts*: Defendant was indicted by the Grand Jury early in May, 1952, and trial fixed for May 20, 1952. On May 16, a motion for a continuance was made, based upon the extensive publicity which the case had received (R. p. 55a). This motion was summarily dismissed the same day.

The type of publicity which the defendant asserted would prejudice the trial of the case is indicated by the several exhibits attached to the Petition for Continuance (R. p. 56, 65a). In a newspaper story dealing with the recommendation of the Economy League to the state legislature of a seven-point reform program, reference was made to "Squire's Gimmicks" and "'Padded Expense of Roving Constables." Squire Ackerman and Deputy Constable Bolden were mentioned by name, as facing trial in criminal court "on multiple charges of operating a gigantic fee racket." This story appeared May 10, 1953. Three days later, on May 13th, the papers headlined the appearance in Harrisburg of District Attorney Malone of Allegheny County, under the caption "Law Makers Hear District Attorney Rap Ackerman." Malone denounced Ackerman as an "outstanding example of the evils of the roving constables' system," referred to his activities as "fee padding" and accused the Squire of soliciting business. The general tone of the articles was highly prejudicial.

On May 18, 1953, argument was heard on the Motions to Quash the Indictments, and again the news-

papers covered the story extensively. By May 20th, when the jury was selected, the District Attorney and the Court were sufficiently aware of the publicity as to readily grant defendant's motion for an examination of jurors on their voir dire. When request was made to sequester the jury for the duration of the trial, the court spoke as follows:

> "Well, in view of the publicity, the wide publicity concerning this case, and in view of the fact that it is very apparent to the court that the local newspapers in all probability will carry accounts of the case, because of previous experience which we have had in this court, I believe it would be advisable to sequester the jury, both to protect the interest of the defense as well as protect the interest of the Commonwealth. We overrule the objection and allow the jury to be sequestered, because unquestionably there are a lot of things that the jury shouldn't know about in the newspapers." (R. p. 76a)

Throughout the trial of this case, pressure was exerted by the trial judge to speed up the proceedings. Late sessions were held every day, and a session was held on Saturday, contrary to usual practice. The jury was constantly reminded that Memorial Day was approaching and the fact that unless the case was rushed through they would be locked up over the long holiday weekend. In Allegheny County, a sequestered jury is confined to quarters in the local jail.

It was in this atmosphere that the jury was asked to consider 106 separate indictments, the testimony of 108 different witnesses, and hundreds of exhibits offered in

support of the cases. These facts made a fair and impartial trial impossible.

B. The Law. Apart from capital cases, there is probably no type of case which presents greater problems in the course of trial than that of a charge against a public official. Such cases are always closely followed by the press, which generally exhibits a marked skepticism as to the innocence of any officeholder accused of crime. Here the newspapers and other media of communication had adjudged Ackerman guilty long before the trial commenced.

In December 1952, the District Attorney seized all of the records in Squire Ackerman's office (R. p. 83a), and this was sensationalized in front-page stories. In March 1953, when some of the indictments involved in this case were returned by the Grand Jury, this was again the subject of widespread publicity. And ten days before trial, the District Attorney himself chose to appear before a legislative committee, to denounce this defendant publicly.

The court itself did nothing to minimize the dangers of pre-trial publicity. Rather, it insisted on having the pre-trial motions disposed of just two days before trial, knowing that the jurors already empaneled would inevitably read the newspaper stories on the court's action.

True, the prospective jurors were examined upon their voir dire and gave assurances that they would be able to decide the case on the evidence offered in court. But to accept such assurances as any real guarantee of impartiality is, at best, naive. As Judge Magruder recently said in reversing the conviction in the case of

Delaney vs. United States, 199 F. 2d 107, 112 (1st Cir. 1952):

> "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity."

The jury was, of course, cautioned to determine this case solely on the evidence, but no special instructions were given in reference to the pre-trial publicity with which most of them had admitted they were familiar. Even if such instructions had been given, they would have been of little use. As Justice Jackson pointed out in his concurring opinion in *Krulewitch vs. United States,* 336 U. S. 440, 453:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury—all practicing lawyers know to be unmitigated fiction."

We are aware that this court has ruled that the burden rests upon the defendant of showing that such actual prejudice has been created by pre-trial publicity as to necessarily prevent a fair trial. *Stroble vs. California,* 343 U. S. 181 (1952). We are also aware that at least several members of this court assign great importance to the fact that prejudicial publicity is instigated by the prosecuting official himself (see dissenting opinion of Mr. Justice Frankfurter in the *Stroble* case, at page 201). The effect of the pervasive pre-trial publicity in this case, part of it instigated by the prosecutor himself, taken together with the other circumstances of the

case, we believe sufficient to constitute a denial of due process.

Well aware of this widespread, unfavorable publicity, the trial court should have been particularly careful to insure that the court proceedings were, in fact, impartial and fair. Speaking to this point in *Commonwealth vs. Petrillo,* 338 Pa. 65, 94-95 (1940), Chief Justice Maxey of the Pennsylvania Supreme Court commented:

> "There is no other case which calls for such strict impartiality on the part of a trial judge and such fearless adherence by him to these 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (Hebert vs. Louisiana, 272 U. S. 312, 316) as those cases which have been sensationalized in the public press. In all such cases there is much *prejudgment* and this is always adverse to *any* of those at whom the finger of accusation points. Anyone mentioned as *in any way connected* with those accused is in the public mind already condemned." (Emphasis the court's)

Despite these factors, the court permitted the consolidation of 106 separate indictments, thus creating such confusion that it became impossible for the jury to discriminate as to the defendant's guilt or innocence in individual cases. With such a mass of formal charges before them, it was inevitable that the jury must conclude that "where there's smoke there must be fire."

The manner in which these prosecutions was brought also affords basis for our claim of denial of due process. No interests of justice requested that a 62 year old defendant be prosecuted on indictments carrying a

maximum possible sentence in excess of 200 years. Nor was it necessary to bring charges of Misdemeanor in Office as companion counts to most of the substantive offenses, since the Commonwealth itself took the position that no additional sentence could be imposed by reason thereof if defendant was sentenced for the substantive offense.

The procedure followed in this case was designed to, and did in fact assure a conviction. To all of these charges the defendant has a good and sufficient defense, which inevitably was lost sight of in the welter of cases. This petitioner has a right to seek the protection of this court in the face of such denial of his constitutional rights.

CONCLUSION

For all these reasons, petitioner respectfully prays that this court issue a writ of certiorari to the Supreme Court of Pennsylvania, to review its order refusing to hear his appeal from the judgment of the Superior Court of Pennsylvania affirming his conviction.

Respectfully submitted,

MARJORIE HANSON MATSON
HARRY S. KALSON
Law and Finance Building,
Pittsburgh, Pennsylvania.

MURDAUGH STUART MADDEN
1000 Hill Building,
Washington, D. C.

Attorneys for Petitioner.

APPENDIX

Opinion of Lower Court.
(All Cases)

Before William L. Showers, P. J. Seventeenth Judicial District, Walter I. Anderson, J. Nineteenth Judicial District, And J. Frank Graff, P. J. Thirty-Third Judicial District.

GRAFF, P. J. Thirty-Third Judicial District, Specially Presiding.

The defendant, Alfred J. Ackerman, was indicted and tried upon eighty indictments, consisting of thirty charges of false pretense, eight charges of extortion, forty charges of misdemeanor in office, one charge of conspiracy, and one charge of violation of the Motor Vehicle Code.

The Jury found the defendant guilty upon fifty-seven indictments indicated before, and returned a verdict of not guilty in eighteen indictments. There were four charges in which demurrers were sustained, and one charge which was nolle prossed.

J. B. Bolden, a Deputy Constable, was tried before the same Jury upon twenty-six indictments, in which verdicts of guilty were rendered.

This matter comes before us upon a motion for a new trial and a motion in arrest of judgment filed in behalf of Ackerman. The motions filed in behalf of Bolden have been withdrawn.

The charges in these cases arise out of alleged misconduct of the defendant in the operation of his office

as Justice of the Peace in the Borough of Whitaker, covering a period of approximately one year and one-half. Some sixty-six hundred cases passed through the office of the Justice during the period investigated, but the actual investigation by the District Attorney's office related to only two hundred cases before him. Whitaker Borough is a relatively small community, and many of the cases in his office were brought there by officers from other districts in Allegheny County. Of the cases which were tried, a great number were brought from the Hill District of the City of Pittsburgh, by Deputy Constable J. B. Bolden, from this district. The press of business in the office of the Justice was such that it required the services of a number of people to dispose of the cases in the office.

Some criticism has been made as to the manner in which the case was tried. Upon motion of the Commonwealth the Jury was sequestered. This was a wise precaution, and judging from the number of communications which the Trial Judge has received in behalf of Ackerman, it is safe to assume that an effort would have been made to influence the Jury in some manner.

Complaint was made that too long hours were used in the trial of the case, that Court was held on Saturday, and that the Trial Judge deprived counsel of the benefit of examining exhibits, for the reason that he used them every night, in consolidating the testimony. In this connection it must be first observed that the hours in the conduct of the trial were not unduly long. There were no night sessions held and the actual time during the day was no longer than is ordinarily used in the trial of cases in our home jurisdiction. Nor can there be any just

complaint about conducting Court on Saturdays, inasmuch as the Jury was sequestered, and it would be an imposition on them to sit for two days without offering any evidence in the case.

Nothing can be further from the truth than that the Court deprived counsel of the use of exhibits. At no time were the exhibits used on any evening by the Trial Judge, and at no time did we work until twelve o'clock at night, excepting the day before the submitting of the case to the Jury, when we outlined the issues in each case, so that the same could be more intelligently presented to the Jury for its consideration.

The reasons advanced in support of the motion are in five divisions.

The first question which arises is whether the consolidation of the indictments in the instant case for the purpose of trial was a proper exercise of judicial discretion. It is here to be observed that the crimes of conspiracy, extortion, false pretense and misdemeanor in office concern a frame of mind, in that the acts must have been committed by the defendant in a wilful and corrupt manner, in order to sustain a conviction. It is well-settled law that independent unrelated crimes cannot be tried at one and the same time. The exceptions to this rule are well-settled. When the independent crimes are so related as to prove guilty knowledge or intent, design, a scheme or plan amounting to a course of conduct, consolidation may be properly had, or evidence of such independent offenses may be offered to prove such, although there is no indictment before the Jury upon such matters. In Commonwealth v. Mulroy, 154 Pa. Super. Ct. 410, 413, is held that where the indictments are

closely related they may be tried together. In Commonwealth v. Reilly, 125 Pa. Super. Ct. 340, where the defendant was tried on sixty-one bills of indictment, it is stated on Page 345 as follows:

> "Each of such acts was plainly a part of a general course of conduct pursued by him in the perpetration of the various frauds."

And it is held in Commonwealth v. Chalfa et al., 313 Pa. 175, that independent offenses may be offered to show motive, plan, design or scheme. See also:

Commonwealth v. Roberts, 161 Pa. Super Ct. 519;

Commonwealth v. Quinn, 144 Pa. Super Ct. 400.

where fifty bills of indictment were consolidated for trial. See also:

Commonwealth v. Lehman, 166 Pa. Super Ct. 181;

Commonwealth v. Kaysier, 166 Pa. Super Ct. 369;

Commonwealth v. McCord, 116 Pa. Super Ct. 480.

The charges in the indictments consolidated were proper evidence upon the conspiracy charge. The number of the offenses clearly indicated that the transgressions were not committed under mistake, and indicated a frame of mind which was wilful and corrupt, as well as a course of conduct proving a plan to cheat and defraud. We are of the opinion that there was no error in the consolidation of the indictments.

It is next contended the motions in arrest of judgment should be sustained as to all misdemeanor in office

charges, which are companion cases to substantive offenses arising out of the same facts. Although there were eighty indictments, only thirty-seven factual situations were presented to the Jury. Out of these factual situations arose charges of false pretense and extortion, as well as indictments for misdemeanor in office. At the beginning of the Charge the Jury was carefully instructed as to what constituted conspiracy, extortion, false pretense, and misdemeanor in office, and as each case was presented to the Jury the character of the offense being considered was then named, and the contention of both the Commonwealth and the defense outlined. It is true that we mentioned during the charge that a misdemeanor in office arose out of the same facts as the false pretense charge. All that was meant by this statement was that it arose out of the same factual situation, and we so indicated when the matter was called to our attention, at the end of the Charge.

The matter now raised was considered upon a preliminary motion to quash the indictments charging misdemeanor in office. Misdemeanor in office is a common law offense, properly brought in situations where a public officer has failed to perform a mandatory duty imposed by statute, or has wilfully and corruptly performed a discretionary duty.

Commonwealth v. Hubbs, 137 Pa. Super Ct. 244.

The well-considered opinion by Judge Braham, speaking for the Court en banc, upon the preliminary motion to quash, clearly answers the question now raised by the defendant. Whilst the defendant mentions in his brief that misdemeanor in office charges are "companion cases to the false pretense and extortion cases", this is

not true, since the misdemeanor in office cases are broader in scope than the other charges. The reason for the motion in arrest of judgment is that Section 1104 of the Penal Code of June 24, 1939, P. L. 872, 18 P. S. 5104, prohibits an indictment for a common law offense when the Legislature has created the offense by statute, and imposed the penalty. Judge Braham in his opinion states as follows:

> "It is unnecessary to discuss separately each of the cases against the defendant. His point is that he cannot be indicted for misdemeanors in office because he is also indicted for the offenses under the criminal code which make up the misdemeanors. Typical are a number of cases where obtaining money by false pretenses is charged. The false pretense as laid in these indictments consists of Ackerman's dismissing criminal charges against certain defendants after collecting costs from them, then falsely swearing before the Controller of Allegheny County that the costs had not been paid and thereby collecting costs from the county. This makes out a case of obtaining money under false pretenses.
>
> "Is obtaining money under false pretenses a different offense when committed by a public officer in the performance of his duty than when committed by a private citizen? Or to put the problem more accurately, when a public officer obtains money under false pretenses, does he also commit an offense at common law known as misdemeanor in office? It is unnecessary to answer this very interesting question at this time because, upon examination of all the indictments against the defendant, it will be

found that in each case in which the defendant is charged with obtaining money under false pretenses the corresponding case of misdemeanor in office contains wider allegations. For example, in some cases the defendant is charged with settling cases when it was not lawful to do so, in others with failing to make the record of a summary proceeding which is required by law, in others with falsely recording a public hearing when none took place, in others with charging more fees than he was entitled to receive, —all in addition to the charge of fraudulently obtaining fees from the defendant and from the county.

"The most common element charged is the taking in the first instance of fees which were excessive. This is an offense at common law: Com. v. Evans, 13 S. & R. 425. Where misdemeanors are of equal rank and the proof of one involves one more fact than another there is no merger of the offenses: Com. v. Falls & Sykes, 107 Pa. Super Ct. 129; Com. v. Yerkes, 86 Pa. Super Ct. 5. The same principle is involved when it is necessary to decide whether prosecution under the common law is barred by prosecution under a statute. Since in each case at bar the common law charge is wider than the statutory charge both may stand."

In the case of Commonwealth v. Dempsey, 146 Pa. Super Ct. 124, a charge of false pretense, extortion and misdemeanor were all joined in one trial. In view of the fact that the misdemeanor charges were wider in scope than the false pretense and extortion charges, we are of

the opinion the motion in arrest of judgment upon such cases must be denied.

The defendant next contends the motions in arrest of judgment or for a new trial should be sustained in those cases wherein the Commonwealth's case was based upon alleged duplication of costs in companion cases. The defendant entirely misconstrues the Commonwealth's position in those cases. If there are two separate and independent cases filed by a prosecutor, it cannot be reasonably maintained that only one set of costs can be collected. The false pretense charges in no instance were based upon any companion case, but each such charge involved a wrongful case where costs were charged to the county and also charged to the parties.

The Chaney cases at 31, 32 33 and 35 May Sessions 1953, involved two false pretense cases and two misdemeanor in office cases, relating to an information made by Mary Chaney for assault and battery, and also a charge of fornication and bastardy. In each of these cases the costs were collected from the defendant Griffith, in the amount of $25.00. In addition to this, the prosecutrix testified that she wanted no charge of fornication and bastardy made, and so advised the Justice. In each case costs were collected from the county.

In the Holliday case the prosecutrix testified that nothing was said about a wilful neglect charge at the hearing, nor did she know anything about the same. Here all costs were collected from the defendant, in the amount of $25.83, and were also collected from the county.

In the Wright-Allen case, charging extortion and misdemeanor in office, the Commonwealth's evidence was

to the effect that $53.40 was collected by the Justice, who kept it all, and paid no part of the money over to Wright, clearly constituting an extortion case, and misdemeanor in office.

In the other cases which are not cited by the defendant in his brief it is clearly apparent that when costs had been collected from the parties they were also collected from the county.

The fourth contention of the defendant is that the cases involving "charges for services not rendered" were submitted upon an erroneous theory of the law, thus requiring a new trial. The fees to which members of the minor judiciary are entitled are fixed by statute; in the instant case the Act of June 21, 1947, P. L. 862. This Act of Assembly does not allow the Justice a specified sum of for each case, but specifically sets forth the fees allowed for all services rendered. A fee is allowed for an information.

A valid information must state a legal cause of action, be subscribed to by the affiant, and must be sworn to before the Justice of the Peace. A blank piece of paper to which the affiant's name is affixed is not a legal information. A warrant, to be legal, must be issued upon the basis of a present and validly existing information. A hearing, to be valid in law, must be one at which the parties appear, and at which witnesses are sworn, although it would not be necessary that witnesses on each side should appear and be sworn.

It is argued in the defendant's brief that the county has paid costs and discharged cases including thousands of dollars for "execution of warrants," and serving of

"subpoenas." If the county is paying out money under such circumstances, it is time that such action be stopped. If the Act of Assembly means anything in fixing various fees it must be complied with.

In the Gantt-Piner case, in which extortion and misdemeanor in office are charged at 85 and 84 May Sessions, 1953, Piner was compelled to pay costs in the amount of $19.05. The case was marked withdrawn, and costs paid. Although charge was made for witnesses sworn, none were sworn, nor was any arrest made.

In Johnson-Giddens, at Nos. 131 and 132 May Sessions, 1953, wherein extortion and misdemeanor in office are charged, two informations were made for failure to support a bastard child. The Justice discharged the case, and put the costs on the defendant, which under the law he had no right to do. The costs on the first information were paid by the county. The costs collected from Giddens in the amount of $25.80 were excessive.

In the case of Price-Jeffery, at 74 May Sessions, and 76 May Sessions, in which extortion and misdemeanor in office are charged, Jeffery testified that he was arrested upon a charge of assault and battery, went out and talked to the defendant Ackerman; there was no hearing; he was not sworn; and he was compelled to pay costs in the amount of $18.05; which is clearly extortion and misdemeanor in office.

In the Harkness-Kramer case costs were collected from the county in the amount of $6.30; no hearing was ever held, nor were any oaths administered, for which charges were made.

In the Johnson-Barrett case, where Ackerman was convicted at No. 102 May Sessions, 1953, of false pretense and at No. 101 May Sessions, 1953, of misdemeanor in office, the Paymaster of the City of Pittsburgh was charged with a misdemeanor, in failing to pay the wages due Wilbur Johnson from the City of Pittsburgh, the case was discharged. The record shows that the complete set of costs were paid by Allegheny County to the defendant Ackerman. There was no arrest made, no warrant executed, no subpoena served, no hearing held, no oath administered. The transcript clearly was entirely fraudulent.

In the Bridges-Malloy case, at 97 May Sessions and 96 May Sessions, 1953, costs were again collected by the defendant from the county, the transcript setting forth that a hearing had been had and oaths administered, none of which took place.

In the Harris-Griffin case at No. 98 May Sessions, 1953, and 99 May Sessions, 1953, charging false pretense and misdemeanor in office, it appears that an information was made against one Griffin, charging him with false pretense, which was an entirely erroneous charge, under the circumstances, which only involved the failure to carry out a promise to pay a certain sum of money. It appears that the defendant Ackerman collected from Allegheny County a total sum of $6.30 as costs in this discharged case, which included $.50 for subpoena, $.75 for a warrant, $1.50 for a hearing, and $.30 for the administration of two oaths, none of which charges were justified.

In the Piner-Robinson case at 87 and 88 May Sessions, 1953, wherein misdemeanor in office and false pre-

tense is charged, the charge of keeping a ferocious dog was dismissed, and costs collected from Allegheny County. The evidence discloses that there was no hearing whatsoever held, any subpoena issued, or any oaths administered to witnesses.

In the Haritos cases, at Nos. 89 and 90 May Sessions, 1953, wherein there is a charge of misdemeanor in office and false pretense, the charge was made of defrauding a boarding house keeper, which was entirely unjustified, under the evidence. There was no hearing, and no swearing of witnesses. The defendant collected costs in the amount of $8.05 from Allegheny County, which included costs for a hearing and for actually swearing the witnesses, which situation never took place.

As hereinbefore stated, we are of the opinion that the defendant Ackerman collected costs from Allegheny County to which he was not entitled, by reason of fraudulent transcripts submitted to the Controller.

The fifth contention is that the motions for a new trial or in arrest of judgment should be sustained in cases thereafter discussed in the brief.

We have already discussed the Chaney case, and indicated the issues submitted to the Jury. Justice Ackerman collected costs from the county in two cases. Costs were also paid by Griffin in the amount of $25.00.

In the Anderson-Green case, at Nos. 52 and 53 May Sessions, 1953, the charge of false pretense was dismissed by Ackerman. Costs were collected from the county in the amount of $6.30. Green testified that he paid costs to the Justice in the amount of $18.75.

The Thomas-Dalton case, at No. 58 May Sessions and 59 May Sessions, 1953, is clearly a case of collecting costs from the parties and collecting them from the county, as well.

In the Kein-Jeffery case, Jeffery was charged with assault and battery by one Mabel Kein. The evidence indicates that costs were collected by the Justice from the Controller's office, and also there are circumstances from which it may be concluded that he collected the same from the parties involved in the case.

In the Price-Jeffery case, at Nos. 74 and 76 May Sessions, 1953, wherein misdemeanor in office and extortion were charged, Jeffery was arrested upon the charge of assault and battery. He went to the defendant's office and was charged $18.05 in costs. There was no hearing had; no witnesses sworn. It is clearly a case of extortion.

The Holiday case has been hereinbefore discussed.

In the Peck-Morante cases at 64 May Sessions and 65 May Sessions, wherein false pretense and misdemeanor in office were charged, it clearly appears that the Justice collected costs from Morante and also from Allegheny County.

In the Parks-Austin case, Nos. 40 and 41 May Sessions, 1953, wherein false pretense and misdemeanor in office are charged, Austin testified that he paid costs of the case to the defendant Ackerman, which the money orders show, and it also appears that the Justice collected costs from Allegheny County.

In the Heater case, at No. 293 and 294 March Sessions, 1953, wherein the defendant is charged with mis-

demeanor in office and violation of the Motor Code, Heater testified that he lived in Ohio, and on April 7, 1952, paid a fine and costs for motor violation to Justice Ackerman. Search was made through the Motor Docket, and no report was made of this case. After the search had been made the defendant claims to have found a report of the case. The question was one for the Jury's determination.

In the Villi case, at No. 137 May Sessions and 138 May Sessions, 1953, wherein extortion and misdemeanor in office was charged, Villi was charged with a traffic violation. He failed to receive the registered letter notifying him that the fine and costs were $15.40. He went to the Borough of Whitaker and paid the defendant $5.00 in excess of the proper charge for fine and costs; clearly a case of extortion.

In the Dudash case, at 115, 116 and 117 May Sessions, 1953, wherein misdemeanor in office, false pretense and extortion were charged, Dudash was arrested for obstructing legal process. Costs were placed upon the county. Dudash testified that there was no hearing held and no warrant issued for his arrest. In this case we permitted the defendant to play a recording of an alleged hearing. The issue was one clearly for the Jury, in determining whether charges were made to Allegheny County for services which were unauthorized under the law.

We conclude that the position of the defense in the fifth contention is without merit.

We have carefully considered the entire record in this case, with a clear understanding that it was not an easy one to try. It must be remembered, however, that

there were not eighty different factual situations. The cases arose out of thirty-seven different sets of facts, and we believe that the verdicts of the Jury indicated that they gave careful consideration to each case. The indictments were sent out with the Jury, to enable them to keep each case separate, when it came up for consideration. The wholesale receiving and disposition of cases in the Justice's office in the small borough of Whitaker from many parts of the county is to be condemned. It further must be considered that this is not the first time that Justice Ackerman has been before this Court upon a similar charge. All of the evidence clearly indicates a wilful, knowing, and corrupt course of conduct, which should not be tolerated by any member of the minor judiciary.

We believe that the defendant received a fair and impartial trial, and that the verdicts are warranted by the evidence, therefore that the motions should be refused.

Orders.

And now, January 4th, 1954, the motions for a new trial are refused.

BY THE COURT,
J. FRANK GRAFF,
P. J. Thirty-Third Judicial District, Specially Presiding.

Eo die Exception granted and Bill sealed.

BY THE COURT,
J. FRANK GRAFF,
P. J. Thirty-Third Judicial District, Specially Presiding.

And now, January 4th, 1954, the motions in arrest of judgment are refused.

BY THE COURT,
J. FRANK GRAFF,
P. J. Thirty-Third Judicial District, Specially Presiding.

Eo die Exception granted and Bill sealed.

BY THE COURT,
J. FRANK GRAFF,
P. J. Thirty-Third Judicial District, Specially Presiding.

Opinion of the Superior Court.

COMMONWEALTH v. ACKERMAN.

Superior Court of Pennsylvania.
July 13, 1954.

Harry S. Kalson, Marjorie H. Matson, Pittsburgh, for appellant.

Samuel Strauss, Wendell G. Freeland, Asst. Dist. Attys., James F. Malone, Jr., Dist. Atty., Pittsburgh, for appellee.

Before HIRT, Acting P. J., and ROSS, GUNTHER, WRIGHT, WOODSIDE and ERVIN, JJ.

HIRT, Judge.

The defendant Alfred J. Ackerman was the Justice of the Peace in the Borough of Whitaker, Allegheny County. Eighty indictments against him were consolidated for trial before the same jury. In the indictments there were thirty charges of Cheating by Fraudulent Pretenses, eight charges of Extortion, forty charges of Misdemeanor in Office, one charge of violation of the Motor Vehicle Code and one charge of Conspiracy. The jury found the defendant guilty on fifty-seven of the charges, and returned verdicts of not guilty on eighteen indictments. There were four charges in which demurrers were sustained; one charge was nolle prossed. J. B. Bolden a deputy constable and co-defendant in the conspiracy and other charges was tried before the same jury upon twenty-six indictments and was convicted on all of the charges. The matter came before the lower court on motions in arrest of judgment and for a new

trial on behalf of defendant Ackerman. Similar motions on behalf of Bolden were withdrawn.

At the argument before the court en banc only the motion for a new trial was stressed. Frank Graff, P. J., who, specially presiding, tried the case, discussed the reasons advanced by the defendant in a comprehensive opinion and, speaking for the court en banc, refused a new trial. Sentence of imprisonment in the Allegheny County Jail for a term of two years was imposed on defendant's conviction of Misdemeanor in Office on Bill 162; it was "further ordered and directed that defendant be and is hereby removed from the Office of Justice of the Peace of Whitaker Borough". Sentences were also imposed on each of the defendant's convictions on Bills 293, 165, 130, 122, 41 and 53, in no instance for a term of imprisonment of more than two years, all to run concurrently in the county jail with the sentence imposed at No. 162 May Sessions 1953. Sentence on the conviction of defendant in every other case was suspended.

Prior to trial the defendant Ackerman had moved to quash 42 indictments charging misdemeanor in office, for the reason that under § 1104 of The Penal Code of June 24, 1939, P.L. 872, 18 P.S. § 5104, one may not be indicted for the common law offense of misdemeanor in office when he is also indicted for a specific offense under the Criminal Code, upon which the charge of misdemeanor is founded. After argument before a court en banc, the motion was refused. The court's reason for the refusal, as stated by Braham, P. J., specially presiding as a member of the court en banc, was that in each instance the common law charge was broader than the charge of the statutory offense and on that ground it was held that

both may stand. The opinion cites Com. v. Falls & Sykes, 107 Pa.Super. 129, 162 A. 482 and Commonwealth v. Yerkes, 86 Pa.Super. 5, in support of the principle that where misdemeanors are of equal rank and the proof of one involves one more fact than another there is no merger of the offenses.

In the present appeals the defendant contends that consolidation of the indictments with the charges against Constable Bolden and the trial of all of them before the same jury deprived him of due process of law, in violation of the Constitution of the United States and of this Commonwealth. He also questions three of the convictions of Misdemeanor in Office on the ground alleged that the acts charged in the indictment, as proven at the trial, constitute statutory offenses. In other cases here on appeal it is contended that the defendant's guilt is not established by the proofs.

[1-3] There can be no difference of opinion as to what constitutes a denial of due process in the trial of one accused of crime: "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice". Lisenba v. People of State of California, 314 U.S. 219, 62 S.Ct. 280, 290, 86 L.Ed. 166. " 'Due process of law' * * * means a course of legal proceedings according to those rules and principles which have been established * * * for the protection and enforcement of private rights". Commonwealth v. O'Keefe, 298 Pa. 169, 148 A. 73, 74; Commonwealth v. Strada, 171 Pa.Super. 358, 90 A.2d 335. But the question, where consolidation of cases is involved, is not to be answered by a mere reckoning of the number of the total charges submitted to a single

jury. Something more is involved. Cf. Commonwealth v. Quinn, 144 Pa.Super. 400, 19 A.2d 526, in which fifty indictments against three defendants were properly consolidated for trial, and Commonwealth v. Reilly, 125 Pa.Super. 340, 189 A. 768, where 61 bills were submitted to the same jury. The general rule has been thus stated: "In the absence of substantial prejudice to accused, the court in its discretion may generally consolidate or try together two or more indictments involving *similar or connected* offenses". 23 C.J.S., Criminal Law, § 931. (Emphasis supplied.) To the same effect is our statement of the principle in this language: "It is the settled rule that the consolidation of indictments, charging separate and distinct offenses is largely a matter within the sound discretion of the trial court, and where the indictments are closely related, his exercise of discretion will not be reversed unless it is clearly shown that the appellant has been prejudiced or injured thereby". Commonwealth v. Lehman, 166 Pa.Super. 181, 183, 70 A.2d 404, 405. The rule has been uniformly applied. Cf. Commonwealth v. Kaysier, 166 Pa.Super. 369, 71 A.2d 846; and Commonwealth v. Roberts, 161 Pa.Super. 548, 55 A.2d 577.

[4, 5] The charges in these cases arose out of misconduct of the defendant in the administration of his office as Justice of the Peace in the Borough of Whitaker over a period of a year and one-half. Some 6,600 cases passed through his office as Justice during the period, but the actual investigation of irregularities related to only 200 cases brought before the defendant. Judge Graff in the opinion for the court en banc states: "Whitaker Borough is a relatively small community, and many of the cases in his office were brought there by officers

from other districts in Allegheny County. Of the cases which were tried, a great number were brought from the Hill District of the City of Pittsburgh, by Deputy Constable J. B. Bolden, from his district."

All of the indictments involved similar or connected offenses. The proofs indicate that each of the defendant's unlawful acts was plainly a part of a general course of conduct in the taking of excessive fees, the collection of costs to which he was not entitled, or the extortion of unlawful payments from litigants, by a variety of means. Cf. Commonwealth v. Reilly, supra. And in the conspiracy charge against him with Constable J. B. Bolden, the alleged conspiracy consisted in a common purpose and design to cheat and defraud the County of Allegheny by the collection of moneys as costs from the county or from persons which were not due them. While the crimes charged were separate offenses, they either grew out of the alleged conspiracy or otherwise were closely related. Ordinarily the trial judge can best determine whether even a large number of bills of indictment may be consolidated without prejudice to the defendant, and we may not reverse except on a clear showing of an abuse of discretion. Cf. Commonweath v. Mulroy, 154 Pa.Super. 410, 413, 36 A.2d 337; Commonwealth v. Tracey, 137 Pa.Super. 221, 8 A.2d 622.

There was no abuse of discretion in the consolidation of the cases for trial and there was no denial of due process on other grounds in these cases. The jurors were examined on their voir dire, and an impartial jury when sworn was sequestered, for their protection from outside influences. Throughout the trial the rights of the defendant were meticulously respected, and in sub-

mitting the cases to the jury Judge Graff in an orderly charge reduced the charges to their simplest terms. At the outset the jury was carefully instructed as to the elements of proof necessary to establish conspiracy, extortion, false pretense and misdemeanor in office and as each case was submitted the character of the offense was again stated and the contentions of both the Commonwealth and the defendant were outlined.

The charges of the eighty bills involved only 37 different factual situations. The indictments were logically grouped by the trial judge and were submitted under file numbers. The grouping of indictments in appropriate classifications in the various files were also taken advantage of by the District Attorney and counsel for defendant at the trial. Each file contained a number of indictments together with all of the exhibits relating to the charges, and verdict blanks for the convenience of the jury. The discrimination exercised in disposing of the charges indicates rather clearly that the jury was not confused and the defendant was not prejudiced by the consolidation of the indictments.

[6] The defendant appealed in 71 April Term, 1954, from a conviction and sentence on Bill 165 charging him with misdemeanor in office. The charge in effect is that, from an ulterior motive to create costs which he could collect from the County under color of right, appellant induced one Marvin Cathcart to bring criminal prosecutions based solely on facts indicating civil damages. The indictment recites that Vander Gaddy, a minor son of Arsie Gaddy, while driving his father's car, injured Cathcart and damaged his automobile in a collision with it. The indictment charges that the defendant

Ackerman well knowing that Arsie Gaddy was not the operator of the automobile involved in the accident nevertheless did corruptly induce him to "to institute criminal preceedings and to sign informations against the said Arsie Gaddy and the said Vander Gaddy charging the criminal offense of assault and battery with an automobile as a result of said accident aforesaid, causing the arrest of said Arsie Gaddy and Vander Gaddy." The indictment further charged that at the time of hearing, the criminal prosecutions were discharged and that subsequently Ackerman, as Justice made a return thereof to the Controller of the County of Allegheny for the payment of costs and did fraudulently and corruptly collect a total of $12.60 as his costs from the county in the two proceedings.

Contrary to appellant's contention, the testimony in the Gaddy case supports a conviction on the charge. It was a fair inference for the jury that appellant invited the bringing of groundless criminal charges as a means of collecting costs to which he was not legally entitled. Marvin Cathcart testified that after his automobile was demolished by a car driven by Vander Gaddy, the boy's father, Arsie Gaddy, at the police station promised to make good the damage. When he failed to perform his agreement, Cathcart consulted "two well-known Magistrates on the Hill" but they refused to handle his case. His lawyer also advised him that his only remedy was by civil action. He nevertheless then discussed the matter with Constable J. B. Bolden who took him to Justice Ackerman's office. He there signed an information in blank naming the father Arsie Gaddy as the defendant. At the time set for hearing on that information when it appeared that it was the son, Vander Gaddy,

who drove the car, that proceeding was abandoned and Cathcart in the presence of appellant signed a second information charging the son with the offense of assault and battery by automobile. At the hearing on the second charge against the son, Cathcart testified that the appellant Ackerman then stated that he would commit the father, Arsie Gaddy, to jail if he failed to make good the damage. After a conference between Cathcart and Arsie Gaddy, which was suggested by appellant an agreement was entered into by them as to the payment of Cathcart's civil damages whereupon the appellant said he would hold the case open "until payment should be made." Arsie Gaddy testified that he knew that the charge against his son was assault and battery and that he appeared at Justice Ackerman's office pursuant to notice from Constable Holden; that he there agreed with Cathcart to replace his automobile which had been demolished in the collision. He further testified that no disposition was made of the criminal charge and that the case is still open to the best of his knowledge. There is in the record an offer of the Commonwealth to disregard the testimony of Cathcart. The appellant's counsel however did not agree to its elimination, stating: "We want the testimony". Cathcart's testimony therefore is a part of the proofs before us in this appeal. Exhibit 51-C, admitted in evidence, contains a transcript of a purported original complaint against Arsie Gaddy charging him with aggravated assault and battery with a club upon which Ackerman as Justice recovered costs in the sum of $6.30 from Allegheny County. Exhibit 51-D, also in evidence, contains a transcript of the complaint against Vander Gaddy upon which appellant collected $6.30 costs in the proceeding against him. Costs

in the total amount of $14.10 were also collected from the county for Constable Bolden in the two proceedings.

[7] Appeal 73 questions the sufficiency of the proofs to sustain the charge of extortion in 122 May Sessions, 1953, in which appellant was convicted and sentenced. A charge of Assault and Surety of the Peace had been brought by Isaac Brown against Early Taylor. The information was signed on January 20, 1951, in Ackerman's office. On the same day Ealon Bonner filed the same charge again Ruth Taylor. Both alleged offenses grew out of the same neighborhood dispute and were consolidated for hearing before appellant. He discharged the defendant Early Taylor and collected a total of $22.10 as costs in that case, from the county. In the second case, appellant imposed the costs on the defendant Ruth Taylor. The same services were rendered and the costs if any to which appellant was entitled were the same in both cases. The costs exacted in the Ruth Taylor case were $38.00. Even if entitled to costs in both cases, and we need not decide that question, the amount collected from the county in the one case fixes the amount of the costs to which appellant was entitled in the other and the excessive costs collected in the Ruth Taylor case sufficiently supports the charge of extortion.

In appeal 72 defendant Ackerman was likewise convicted and sentenced in 130 May Term, 1953, on a charge of Extortion. The evidence is clear that on a charge against Conway Brown, Ackerman as Justice imposed the costs on him and exacted $53.40 which was far in excess of costs allowable by law.

[8] Ackerman appealed in number 74 from his conviction and sentence in 41 May Sessions, 1953, on a

charge of defrauding the County of Allegheny by False Pretenses. One Parks signed a blank information charging Junius Austin with aggravated Assault and Battery. At the hearing held on June 29, 1952, Ackerman as Justice ordered Austin to reimburse Parks for hospital and doctor bills paid by him and he also ordered Austin to pay the costs. On February 6, 1952, appellant collected costs from the county on a false transcript of the case in the sum of $8.05 notwithstanding the fact that he had previously put the costs on the defendant Austin. Admittedly Austin paid Ackerman a total of $134 against the prosecutor's total medical expense of $114. The excess of $20 was retained by the appellant as costs and the double collection of costs adequately supports the charge. The appellant does not deny the collection of double costs in this prosecution but relies on the technical objection that the proof of the date of the offense varied from that set forth in the indictment. There is no merit in the contention since time was not of the essence and it was not necessary to prove commission of the offense on the date laid in the indictment inasmuch as the proofs establish a date within the statutory period. Commonwealth v. Ryhal, 274 Pa. 401, 118 A. 358; Commonwealth v. Weiss, 284 Pa. 105, 130 A. 403.

[9, 10] Appeal number 69 from 162 May Sessions 1953, appeal 70 from 293 March Sessions, 1953, and appeal 71 from 165 July Sessions, 1953, all involve convictions of the common law offense of Misdemeanor in Office. The indictments in these cases also charged specific offenses made misdemeanors by the provisions of Sections 1205-1207 of the Motor Vehicle Code of May 1, 1929, P.L. 905, 75 P.S. §§ 735, 736, 737. Under § 1104 of The Penal Code of June 24, 1939, P.L. 872, 18 P.S.

§ 5104, there may not be an indictment for a common law crime where the legislature has made the Act a statutory offense and has imposed a penalty. In appeals 69 and 71 the charges and the proofs of misdemeanor in office were broader than the statutory offense and there was no merger for that reason. In 293 March Term, 1953 the proofs established no more than violations of the Motor Vehicle Code made a misdemeanor punishable by fine and imprisonment for 60 days. A penalty was imposed, on the general verdict of two years imprisonment. Defendant is entitled to a new trial on this indictment and if the case is retried the Commonwealth will be obliged to elect to proceed on the statutory charge alone.

We find no merit in any of the other appeals from the convictions and sentences in the court below. In the imposition of concurrent sentences the defendant was treated most leniently.

The judgment and sentence in the appeal number 70 April Term, 1954 is reversed and a new trial awarded. In all other appeals the judgments of sentences are affirmed and it is ordered that the defendant appear in the court below when called and that he be committed until he shall have complied with the sentences or any part of them which had not been performed when the appeal in each of these cases was made a supersedeas.

RHODES, P. J., absent.

Order of the Supreme Court of Pennsylvania.

October 13, 1954 Petition denied.

PER CURIAM.

FEB 3 1955
HAROLD B. WILLEY, Cle

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 519

COMMONWEALTH OF PENNSYLVANIA,
Respondent

v.

ALFRED J. ACKERMAN, Petitioner

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

JAMES F. MALONE, JR.
District Attorney
ALBERT A. FIOK
SAMUEL STRAUSS
WENDELL G. FREELAND
Assistant District Attorneys

302 Court House
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 430-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

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COUNTER-STATEMENT OF QUESTIONS FOR REVIEW.

I. Does the consolidation for trial of several indictments for similar and connected offenses constitute a denial of due process?

II. Does publicity concerning the trial of a well-known public official constitute a denial of due process?

COUNTER-STATEMENT OF THE CASE.

The petitioner Alfred J. Ackerman was tried on a total of eighty indictments. Of this group, thirty were charges of false pretense, eight were charges of extortion, forty were charges of misdemeanor in office, one was a charge of conspiracy and one was a charge of violation of the Motor Vehicle Code. The charges in these cases arose out of alleged misconduct of the petitioner in the operation of his office as Justice of the Peace in the Borough of Whitaker, Allegheny County, during a period of approximately one and a half years. The investigation by the District Attorney related to only two hundred cases handled by the petitioner though 6600 cases were handled by him during the period of one and a half years investigated.

After the investigation was completed and informations were made, the matters were presented to the March, 1953 Grand Jury. At that time, original counsel for the petitioner had agreed to the consolidation of similar charges into a single indictment. Thus, there were five indictments returned by the March, 1953 Grand Jury: one for false pretense containing thirty counts; one for extortion containing eight counts; one for misdemeanor in office containing forty counts; one for conspiracy with J. B. Bolden, the co-defendant in the trial; and one for violation of the Motor Vehicle Code. When an objection to the return in this manner was raised on behalf of the petitioner, the matters were resubmitted to the May, 1953 Grand Jury which returned the indictments upon which the petitioner was tried. It should be noted that all of the substantive offenses charged are

misdemeanors except for false pretense, which was changed from a misdemeanor to a felony by the Act of May 21, 1943, P. L. 306, Section 1.

The jury was selected after a *voir dire* examination as requested by counsel for the petitioner, which request was not objected to by the Commonwealth. In fact, the arrangements for such examination had been made prior to the request of petitioner's counsel (R. p. 73a). Further, at the request of the Commonwealth, the jury was sequestered and it was explained to counsel for Ackerman that the sequestration would mean that the jurors would not have access to newspapers, radio or other media of news dissemination. (R. pp. 74a-76a.)

Counsel agreed to a method of presentation of evidence and direct and cross-examination of the petitioner so that each series of cases was denominated as File No. 1, etc., and the petitioner answered the charge of each such file and was cross-examined on each such file. Thus, neither the prosecution nor the defense jumped from one factual issue to another in the course of examination. The proofs offered by the prosecution consisted of photostatic copies of the transcript of the Controller of Allegheny County showing the date and amounts of costs collected from the county in each case by petitioner and testimony from witnesses that they had also paid costs on the same case or cases to petitioner; other testimony by witnesses who were involved in cases before Ackerman corroborated by petitioner's own records and notations concerning the cases. The evidence involved thirty-seven factual situations out of which had arisen the number of criminal charges for which petitioner stood trial.

Counter-Statement of the Case.

The trial lasted nine days which is not an unusually long time for a case involving a public official charged with misconduct during his term of office. The jury discriminated among the cases and found the petitioner guilty on 57 indictments and not guilty on 18 indictments and the petitioner was sentenced on only nine cases for a total period of two years, sentence being suspended on the other 48 cases (R. p. 1423a).

The instant petition for writ of certiorari seeks to overturn the convictions as sustained in eight cases by the Superior Court, the Supreme Court having refused to review such decision.

ARGUMENT.

I. The consolidation for trial of several indictments for similar and connected offenses did not deny due process of law.

The matter of consolidation of indictments for trial has always been considered to be a matter within the discretion of the trial court. This is true in those jurisdictions which have statutes permitting consolidation as well as in Pennsylvania in which the propriety of consolidation in criminal cases is the subject of judicial decisions rather than statutes. *Withers v. Commonwealth,* 5 S & R (Pa.) 59 (1819); *Commonwealth v. Quinn,* 144 Pa. Superior 400 (1941); *Commonwealth v. McCord,* 116 Pa. Superior 480 (1935); *Commonwealth v. Waggy,* 116 Pa. Superior 480 (1935); *Commonwealth v. Reilly,* 125 Pa. Superior 340 (1937); *Commonwealth v. Danleczk,* 85 Pa. Superior 253 (1925); *Commonwealth v. Valotta,* 279 Pa. 84 (1924).

In these cases, the test has been whether or not the indictments involved similar or connected offenses. The basic and overriding fact which the petitioner overlooks *in the instant case is that the offenses for which he was tried are similar and connected—a part of a continuing course of conduct by him exemplified by similar methods to the smallest details in many of the cases.* The proofs of each indicated a plan, scheme and design to cheat, extort and defraud. *All of the offenses either grew out of the alleged conspiracy or were otherwise closely related.* Each of the courts of Pennsylvania before which the case was heard has so held.

Argument.

An exhaustive review of the authorities reveals that in *no* case, except *Hostetter v. U.S.*, 16 F.2d, 921 (C.A. 8, 1926), has the proposition of the petitioner anent due process been raised. In that case, the court said of the argument that the consolidation of cases for trial constituted a violation of the guarantees of the Fifth Amendment:

> "It seems to us that point is likewise without merit, and we find nothing in the authorities cited by counsel for plaintiff in error which ought to mislead counsel in urging such proposition to this court."

The proposition advanced by the petitioner would disregard the basic inquiries into fairness, justice and lack of prejudice of the proceedings below and create an artificial standard with some relation to a magic number of cases which may properly be consolidated beyond which number a prosecutor dare not go. At no point in these proceedings has the petitioner shown those evidences of unfairness and injustice which shock the conscience. The decisions of cases relied upon by the petitioner as being analogous to the instant case are clearly inapposite. The cases *Manley v. State of Georgia*, 279 U.S. 1, (1929) and *Monsette v. U.S.*, 342 U.S. 246 (1951) urged upon this court, in absence of other authority, as analogous to the instant case involved specific statements—by statute and by the trial judge's instructions—that the presumption of innocence did not apply in those cases.

Nor is *McElroy v. U.S.*, 164 U.S. 76 (1896) a good guide for the course the instant case should take, for in that case different persons were involved in different transactions not connected. The procedure in that case

failed to meet the test of the federal act which authorized consolidation. That the procedure in the instant case meets the test of the law of Pennsylvania is indicated by the approval of consolidation of indictments for trial in the following cases: *Commonwealth v. Quinn*, *supra*, in which 50 indictments against three defendants were properly consolidated, and *Commonwealth v. Reilly*, *supra*, in which 61 indictments were properly consolidated.

To the same effect is the following statement by the Superior Court of Pennsylvania in *Commonwealth v. Lehman*, 166 Pa. Superior 181, 183 (1950):

> "It is the settled rule that the consolidation of indictments, charging separate and distinct offenses is largely a matter within the sound discretion of the trial court, and where the indictments are closely related, his exercise of discretion will not be reversed unless it is clearly shown that the appellant has been prejudiced or injured thereby."

A strong, though not absolutely necessary consideration in questions of consolidation of indictments for trial is whether or not, if separate trials had been granted, the evidence of other offenses would have been admissible in the trial of any one of the cases. This goes to the very heart of petitioner's argument that the presentation of evidence relating to these charges so overwhelmed the jury with its sheer weight that the presumption of innocence was lost. That evidence of the other offenses would have been admissible is beyond dispute. As the lower court said at p. 1403a of the Record:

> "The charges in the indictments consolidated were proper evidence upon the conspiracy charge.

> The number of the offenses clearly indicated that the transgressions were not committed under mistake, and indicated a frame of mind which was wilful and corrupt, as well as a course of conduct proving a plan to cheat and defraud."

It may properly be added that as to any of the indictments, the various acts alleged in the other indictments were the result of a general plan of the petitioner and would have been admissible in evidence.

In *Commonwealth v. Shaffner*, 72 Pa. 60, Chief Justice Agnew discussed this matter on page 65:

> "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, liking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other."

It can be seen that the test to be applied in the instant case is not academic, but practical. Actual prejudice should be shown. Thus, petitioner has not and cannot show that he was denied due process of law. Nothing has been shown to cause this court to reverse its position in the case of *U.S. v. Ashe*, 270 U.S. 424 (1925). See *Commonwealth v. Valotta, supra.*

It is blandly asserted by petitioner that the interests of justice did not require that the petitioner be subjected to prosecution for offenses carrying a maximum possible sentence in excess of 200 years. The petitioner is not, however, so bold as to assert that there was not a basis for such prosecution—a basis found in the records and conduct of the petitioner, a basis supported by such evi-

dence that induced the trial and appellate courts of Pennsylvania to reject, upon an examination of the evidence, his claims that the evidence was insufficient to sustain a conviction.

II. The fact of pre-trial publicity did not constitute a denial of due process.

The second basis upon which petitioner seeks to support his application to this court is that the mere fact of pre-trial publicity amounts to a denial of due process. This is wholly without merit.

The petitioner sets forth that the Superior Court disposed of his argument as to pre-trial publicity. This assertion is without foundation in fact. The specific questions raised by the petitioner before that court, in addition to the question of consolidation of indictments for trial, were: "Can convictions for the common law offense of misdemeanor in office stand where the acts charged constitute statutory offenses?" and "Did the Commonwealth fail to make out a prima facie case in certain of the cases here on appeal?" The matter was neither raised nor considered by the Superior Court of Pennsylvania.

In addition to the nebulous position of petitioner as to the proper raising and disposition of this "federal question" in the Superior Court, it should be noted that the argument fails on the merits. It is true in this case as in *Stroble v. California*, 343 U.S. 181, in which this court said at page 195:

> "There is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury."

Argument.

All of the safeguards that are designed to protect a defendant in a criminal case, concerning which there has been extensive pre-trial newspaper coverage, were afforded the petitioner: jurors were subjected to *voir dire* examination and were sequestered during the trial and not allowed to read or listen to news concerning the case. Petitioner forgets that his alleged misconduct was the proper subject of news stories and comment, for, as a public official, his conduct was newsworthy. In this age of highly developed systems of news dissemination, it is inconceivable that no publicity would be given to a case of this kind. The basic question which the petitioner cannot and has not answered affirmatively is: was the petitioner substantially prejudiced? Without an affirmative answer to this question, the petitioner is in no position to call upon this Court for aid.

CONCLUSION.

The respondent submits that the petition is without merit and the writ is sought only for the purpose of delaying the ends of justice. The petitioner is and was not an inexperienced individual in the mechanics of the law—having disposed of criminal cases brought before him as a justice of the peace over a period of twenty years. He was not confused by the consolidation of trial on these charges. Neither was the jury confused for it returned verdicts of not guilty in 18 cases. The presumption of innocence was not and cannot be destroyed by sheer numbers alone. It is perfectly apparent that, in this regard, wide latitude must rest with the trial judge. If the trial court cannot exercise discretion in such matter, this Court will be compelled to dispose of a deluge of petitions asking determination of what number of indictments may be consolidated for trial, what number are permissible, before a violation of due process occurs! Your respondent respectfully prays, therefore, that the petition for writ of certiorari to the Supreme Court of Pennsylvania be denied.

Respectfully submitted,

JAMES F. MALONE, JR.,
District Attorney
ALBERT A. FIOK,
SAMUEL STRAUSS,
WENDELL G. FREELAND,
Assistant District Attorneys